12858 Boyle Proc. I

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-196832 DATE: February 14, 1980

MATTER OF: Holmes and Narver Inc. DLG03908

DIGEST:

1. Protester contends that awardee's offer--proposing reduced ceiling on maximum award fee and nonlinear computation formula shifting greater risk to contractor--constituted material deviation from RFP's mandatory requirements, thus prejudicing other offerors and Government's best interests. Contention is without merit since (1) purpose of competitive negotiated procurement is to satisfy Government needs under best terms and conditions, including cost, and (2) in circumstances, protester was not actually prejudiced since had awardee proposed on 10-percent basis or had protester reduced award fee to 0 percent, ranking of offers on cost basis would not have changed.

2. Contention--that awardee's offer to perform communications study at "no cost" was material departure from RFP's requirements requiring rejection or amendment of RFP to give protester chance to offer such study--is without merit since (1) study was within scope of RFP, (2) agency had no duty to disclose awardee's proposed study to other offerors, (3) consideration of study was properly within RFP's disclosed evaluation criteria, and (4) study was of minor importance and did not determine selection of awardee.

3. When new basis of protest is based on material in agency report, as here, to

[Contract Award Protest] AGC00095

111573 ~~068681~~ DLG03909

be considered timely, matter must be raised within 10 working days of receipt of report even if protester's comments on report are not due until after 10 working days. However, since protester may have been misled by instructions that comments on agency report were to be submitted after informal conference, merits of protest--based on report--first raised after conference will be considered.

4. Contention--that contracting officer's selection of awardee was based unduly on awardee's reduced award formula and proposed communications study, resulting in entirely different selection criteria than that disclosed in RFP--is without merit since GAO concludes that consideration of formula and study were properly within disclosed evaluation factors and agency followed disclosed evaluation scheme in selecting awardee.

5. Protester contends that errors in evaluation were basis for agency's selection of another offeror. Although agency did not have opportunity to rebut in detail contention first made in protester's final substantive submission, agency's initial documented report provided basis for GAO to review contention without another agency report. Contention is without merit since each alleged error is essentially protester's disagreement with agency's judgment of proposals' relative merit, which does not provide basis for GAO to disturb agency's award determination, and GAO has no basis to conclude that evaluation was erroneous or prejudicial to protester.

Holmes and Narver Inc. (H&N) protests the award by the National Science Foundation (NSF) of a contract under request for proposals (RFP) No. 79-105

to ITT Antarctic Services, Inc. (ITT). The contract is a cost-plus-award-fee (CPAF) contract for various operating, logistic, design and construction services in support of the Antarctic Research Program. At the debriefing, H&N was informed that the contract was awarded to ITT because of (1) ITT's offer to accept a lower award fee, and (2) ITT's offer to provide, "at no cost," a study of a communications system for Antarctica.

In essence, H&N contends that the award was improper because the RFP did not call for proposals on either item, and the other offerors were given no opportunity to offer competing proposals. Further, H&N contends that the agency made numerous errors in evaluating proposals. In response, the agency and ITT argue that the lower fee and communications study bases are without merit and the erroneous evaluation basis is untimely. The agency requests our decision by February 15, 1980.

For the reasons outlined below, the protest is denied.

I. THE AWARD FEE PROVISIONS

The RFP and the proposed contract attached to the RFP contained the following language:

> "The anticiptated CPAF Contract will have a zero (0) minimum or base fee and an award fee of up to ten (10) percent of the estimated cost of the contract."

The proposed contract also contained this language:

> "The maximum amount of award fee obtainable for any one (1) year period will not exceed ten (10) percent (%) of the predetermined estimated cost of performance * * *."

H&N notes that there was no provision in the RFP calling upon or permitting offerors to propose the maximum award fee; however, ITT proposed that the maximum award fee be 5 percent for the first year, and 7 percent thereafter, and ITT also proposed a nonlinear award fee computation formula shifting greater risk to the contractor. The agency regarded ITT's award fee proposal as representing a significant and substantial cost benefit to the Government. In H&N's view, this was a material departure from the provisions of the RFP and the proposed contract.

Citing applicable procurement regulations and decisions of our Office, H&N states that it is fundamental that offerors in negotiated procurements must be afforded an equal basis on which to compete and be evaluated. H&N argues that it never had an opportunity to propose a smaller award fee; since NSF represented to H&N that the contract would positively provide for a maximum award fee of 10 percent, NSF lulled H&N into a feeling of security that the contract would necessarily so provide, yet NSF relaxed the stated requirements of the RFP by silently accepting ITT's nonresponsive proposal cutting the maximum award fee.

Here, we must decide whether ITT's proposal constituted a material deviation from the RFP's mandatory requirements which prejudiced other offerors or the Government. See ABL General Systems, Corporation, 54 Comp. Gen. 476 (1974), 74-2 CPD 318, and decisions cited therein; Keco Industries, Inc., B-195520.2, January 7, 1980, 80-1 CPD ___.

A. Was the Maximum 10-Percent Award Fee a Mandatory Requirement?

NSF reports that it was not. NSF finds it extremely difficult to understand how an experienced Government contractor such as H&N, the incumbent, could assume that NSF would be unwilling to consider a lower fee schedule. NSF explains that ITT's interpretation of the RFP, both initially

and in its best and final offer--to permit a reduced maximum award fee and a revised schedule lowering the amount of fee it would receive in relationship to its performance evaluation scores--was proper.

NSF believes that negotiation of fees is fundamental to cost contracts, and while the language of the RFP did not expressly suggest or invite negotiation in this area, the RFP did not prohibit it. NSF explains that this is such an elementary point that instructions on this were not needed.

NSF notes that the RFP contained the terms "contemplated" and "anticipated" in connection with the contract type as further indication that the RFP did not unequivocally preclude proposals on alternative contract types let alone the fee schedule. In addition, NSF notes that the award fee limit was stated as being "up to 10%."

Finally, NSF refers to our decision in Marine Management Systems, Inc., B-185860, September 14, 1976, 76-2 CPD 241, and our decisions at 48 Comp. Gen. 256 (1968), and 40 Comp. Gen. 518 (1961), as supporting its position that there is no basis to protest if an agency considers pricing terms and conditions more favorable to the Government than those mentioned in the solicitation. On this point, ITT believes that Gary Aircraft Corporation; National Fleet Supply, Inc., B-193793, August 9, 1979, 79-2 CPD 104, is a recent decision supporting NSF's view.

ITT also notes that the original RFP provided that "[t]he anticipated CPAF contract will have a zero (0) minimum or base fee and an award fee which will be ten (10) percent of the estimated cost of the contract," but the amended RFP substituted three words which changed entirely the meaning of that paragraph:

> "The anticipated CPAF contract will have a zero (0) minimum or base fee and an award fee of up to ten (10)

> percent of the estimated cost of the contract." (Emphasis added.)

Citing the rule of construction that amending the language of a provision is indicative of an intent to change its meaning, ITT concludes that the change in language, therefore, must have meant a change in the meaning to the interpretation urged by NSF and ITT--that the fee was subject to negotiation up to 10 percent.

In reply, H&N points out that the language "up to ten (10) percent" gave the discretion to the contracting officer--not ITT--to award 10 percent, or less, on the basis of contract performance, but the RFP stipulated a 10-percent ceiling. H&N contends that none of the decisions cited by NSF or ITT permit an agency to depart from mandatory solicitation provisions without providing other competitors an opportunity to compete on an equal basis. Instead, H&N believes that our decision in Bristol Electronics, Inc.; E-Systems, Inc., Memcor Division, 54 Comp. Gen. 16 (1974), 74-2 CPD 23, affirmed, B-180247, December 26, 1974, 74-2 CPD 381, should control the outcome here.

We have carefully examined the numerous and detailed submissions provided by the parties and note at the outset that ITT has not taken exception to any NSF requirement and has offered to meet all NSF's needs reflected in the RFP. The problem arises because ITT offered to do so at a reduced maximum possible cost to the Government according to a fee curve shifting greater risk to the contractor than that outlined in the RFP. The essence of H&N's protest is that it was unaware that, in this negotiated procurement, it could have offered to do the required work at greater risk and for a lesser possible maximum cost to the Government than 10 percent. This aspect of H&N's protest is without merit for the essence of competitive negotiated procurement is for the Government to obtain its requirements under the best terms and conditions, including cost. Our conclusion--that offerors are always free to propose better price or cost terms

and conditions than those contemplated in an RFP--is supported by the following decisions.

In 40 Comp. Gen. 518, supra, although the solicitation did not contain any provision with regard to cash discounts for prompt payment, one bidder offered a discount, which proved decisive. We held that the offering of a discount when none is requested is not a variance from the specifications. Similarly, in 48 Comp. Gen. 256, supra, one bidder proposed a quantity discount, which had not been solicited by the agency but which proved dispositive in making the award. We did not object to award based on an unsolicited quantity discount because the Government has a right to take advantage of a clearly offered benefit which did not contravene any stated solicitation requirement or prohibition. In Marine Management Systems, Inc., supra, the solicitation contemplated and the agency told offerors that it preferred a cost-reimbursement contract but one offeror proposed a fixed-price contract. We stated that since a fixed-price contract is inherently more advantageous to the Government than a cost-reimbursement contract, a fixed-price proposal may be considered even though the Government indicated a preference for a cost-type award.

In Gary Aircraft Corporation, supra, the solicitation contemplated that certain Government-furnished property would be shipped to the bidder's plant at Government expense but one bidder offered to assume these shipping costs. We held that the agency could properly consider the bid and omit from the evaluation the shipping costs the Government would otherwise bear.

Thus, an agency may accept a proposed cost or price benefit, even where it is not contemplated in the solicitation, as long as the proposal conforms with regard to quality, quantity, and delivery. In sum, the proposition advanced by H&N--that NSF had a mandatory requirement representing a legitimate need to award its contractor a fee up to a maximum of 10 percent--is one which we must reject. None of the decisions cited by H&N--and none of which

we are aware--would support the proposition that an agency is authorized to spend more than the minimum amount of appropriated funds required to satisfy its needs.

B. Was H&N Prejudiced by NSF's Acceptance of ITT's Offer with the Lower Award Fee Provisions?

While we do not believe that, in these circumstances, it was improper for NSF to have accepted ITT's offer with its award fee provisions, H&N's perception that it was prejudiced should be addressed and the applicability of several of our decisions should be discussed, particularly H&N's reliance on Bristol Electronics, Inc., supra, and Keco Industries, Inc., supra.

In Bristol Electronics, Inc., supra, the solicitation announced that award would be made based on the low schedule prices for the base quantities and the solicitation prohibited prices higher than schedule prices for option quantities. One offeror proposed the lowest base prices, but higher option prices, so that when option quantities were made part of the award determination, that offeror did not propose the low price to the Government. We held that acceptance of its offer prejudiced other offerors and was not in the best interests of the Government. There, the nonconforming offer did not propose a price benefit to the Government and prejudiced other offerors and, therefore, its acceptance was not proper.

By comparison, our decision in Keco Industries, Inc., B-183114, May 19, 1975, 75-1 CPD 301, rests on the Bristol rationale. There, the solicitation required that unit prices be the same for all program years. Keco did not submit the same unit price for each program year, but Keco's prices were the lowest for each year and the lowest overall. Relying on our decision at 44 Comp. Gen. 581 (1965), we concluded that (1) the Government's interests were not prejudiced by Keco's failure to follow the solicitation's pricing scheme because Keco's bid represented the lowest cost to the Government and (2) no other

bidder was prejudiced since the difference between Keco's low bid and the next low bid was so significant that had that bidder been permitted to bid in the manner Keco did it would not have been low.

Applying these principles to the instant matter, first we observe that ITT's award fee proposal did not prejudice the Government's best interests. Second, NSF reports that if ITT had been required to bid a 10-percent maximum award fee, because overall costs proposed by ITT were approximately $860,000 lower for the first year's effort, NSF believes that a saving of over $300,000 would still result even if both proposals were evaluated using the same fee schedule.

Finally, we calculate that even if H&N had elected to lower its maximum award fee to zero (0) percent, ITT would still have had an estimated cost advantage when combined with ITT technical superiority which could not have affected NSF's award selection. Further, NSF reports that ITT was ranked higher in four of six cost areas and in the other two both offerors were considered equal; thus, even if ITT's edge in the cost area was reduced, it would still have had the superior business proposal and a superior technical proposal, so it is clear that ITT would have received the award in any case. Accordingly, this aspect of H&N's protest is denied.

II. THE COMMUNICATIONS STUDY

In essence, H&N contends that ITT's offer to perform a communications system study "at no cost" was a material departure from the terms of the RFP, since there was nothing in either the general description of work or in the detailed scope of work of the proposed contract calling for a communications system study.

NSF reports that the communications study proposed by ITT was not a major factor in NSF's award decision. NSF explains that, in the evaluation of business proposals, the business evaluation panel treated the communications study as one of a number of factors

considered within the category of "special features," which was only one of six major categories considered by this panel.

NSF also explains that in the evaluation of technical offers the communications study was included in the subelement of innovative ideas within the general category of offeror's "Understanding of Project"; the actual weight assigned to this innovative ideas subelement was 0.8 out of a total of 120; thus, the greatest weight that the communications study could have had was approximately two-thirds of one percent. NSF reports that both parties presented several innovative ideas that were considered under this element; thus, the actual weight given to the communications study was even less than 0.66 percent. NSF concludes, therefore, that the communications study was not as important in the overall technical evaluation as H&N believes. NSF states that it is aware of no basis for requiring an agency to provide other offerors with the opportunity to match another offeror's proposal to provide services within the scope of the procurement which are to be performed at no cost to the Government.

Finally, NSF reports that the free communications study was a minor item and even if it had not been offered the outcome of this procurement would not have been affected.

In reply, H&N argues that the promise to perform an extensive and expensive study is not an "idea," went beyond the requirements of the RFP, and was nonresponsive. H&N notes that the contracting officer stated that the evaluators were "impressed especially" by the proposal to perform a communications study. H&N believes that the communications study was a main reason why the contracting officer erroneously concluded that ITT should be considered technically superior. Accordingly, in H&N's view, the subject of a communications study should have been stated in the RFP, not permitted to become the subject of a nonresponsive proposal which was accepted, secretly and silently, through the back door.

In response, ITT states that the RFP listed "innovative ideas" as one evaluation subcriterion, comprising part of the major technical evaluation criterion regarding the offeror's understanding of the project, which explicitly includes communications work. Where a solicitation imposes communications responsibilities on the contractor and seeks innovative ideas, in ITT's view, an offeror's suggestion of a communications study to improve the reliability of communications cannot be considered a deviation from the solicitation.

Finally, ITT states that, in cases in which the Government has sought innovation, our Office has firmly endorsed the decision of agencies not to disclose one offeror's innovative ideas to another.

We have closely reviewed the arguments presented and must conclude that a study concerning communications improvement was within the scope of the RFP's work, that the agency had no duty to disclose this element of ITT's proposal to H&N (see Tracor, Inc., 56 Comp. Gen. 62 (1976), 76-2 CPD 386), that consideration of such matters was within one of the RFP's disclosed evaluation criteria, and that the offer of the study was of minor importance and did not determine the outcome. Accordingly, this aspect of H&N's protest is denied.

III. EVALUATION ERRORS

The technical evaluation panel rated H&N's revised technical proposal 21 points higher than ITT's score of about 5,600 points and the business evaluation panel considered ITT's cost proposal to be significantly superior. The contracting officer, however, determined that ITT's technical proposal was better than H&N's. H&N believes that the contracting officer's determination to consider ITT's proposal technically and cost superior to H&N's is based unduly on the reduced award formula and the communications study, resulting in an abandonment of the original evaluation scheme which changed the entire selection criteria.

Secondly, H&N states that (1) the contracting officer erroneously believed that an H&N representative did not go to Palmer Station, (2) the contracting officer should not have considered one evaluator's views as biased toward H&N, (3) H&N should have been credited weight equal to ITT for its full-time manager, (4) H&N should have been credited with the same management organization strength as ITT, (5) NSF should have recognized that ITT's offer to use the Palmer Station manager as relief for the R/V Hero is unrealistic, (6) ITT provided no engineering support in its proposal but H&N did, (7) NSF personnel misevaluated the cost realism of ITT's approximate $300,000 labor cost saving, and (8) H&N was not credited with experience for operating the R/V Hero.

We note that H&N's contentions regarding evaluation errors are all based on information contained in NSF's December 17, 1979, report, but these bases of protest were not raised until January 16, 1980, more than 10 working days after they were or should have been known. ITT argues that H&N is raising additional grounds of protest at a very late date. ITT refers to section 20.2(b)(2) of our Bid Protest Procedures, which requires that a protest be filed within 10 days of when the basis becomes known or should have been known; since the additional matters were not raised within the 10-day period, ITT concludes that they are untimely and should not be considered.

GAO's Bid Protest Procedures are designed to promote prompt resolution of protests and, therefore, without exception, to be considered timely, protesters must raise new bases of protest within 10 working days of actual or constructive notice. H&N did not do that here; however, in order to expedite our resolution of this matter by February 15, 1980, we asked the parties not to comment on the NSF report until after the informal conference.

Perhaps, H&N believed that our instruction prohibited it from filing a new basis of protest

until it submitted its comments on the agency report. That belief would have been erroneous because in these circumstances new bases of protest must be filed within 10 working days after actual or constructive notice. Accordingly, while our Procedures would otherwise mandate a finding of untimeliness, here we will consider the merits of these alleged evaluation errors.

Further, except for NSF's general denial of merit to this basis of protest provided in a letter received here on February 5, 1980, we note that the agency had no opportunity to expressly rebut H&N's specific allegations; however, since the NSF's initial report was thorough and well documented, we have been able to review the matter on the merits without waiting for more reports from ITT and NSF.

First, we view the contracting officer's analysis of the relative technical rankings of the offerors as being performed reasonably within his wide discretion in such matters, particularly where, as here, his selection was based on the factors and relative weights stated in the RFP. We will not substitute our judgment for a contracting officer's, particularly in complex technical matters, as here, unless it is shown that his judgment is clearly erroneous, arbitrary, or in violation of statutes or regulations. CompuScan, Inc., 58 Comp. Gen. 440 (1979), 79-1 CPD 288.

Regarding the eight errors presented by H&N, we note that numbers (3), (4), (5), (6) and (8) are all based on the fact that the contracting officier's source selection memorandum did not expressly mention the meritorious aspects of H&N's proposal. H&N overlooks, however, the significant extent to which each of the technical evaulators examined these aspects of H&N's proposal relative to ITT's and the extent to which the contracting officer analyzed each evaluator's comments.

Further, relative to number (8), we note that the contracting officer credited H&N with prior successful operation of the R/V Hero, but he felt that the crew deserved most of the credit and

ITT's proposed crew had capabilities on a par with H&N's. Specifically relative to numbers (3) and (4), we note that the contracting officer recognized the differences in management approaches between H&N and ITT and he expressly favored ITT's. Relative to number (6), the contracting officer recognized that there were technical advantages to both proposals, but he concluded that ITT's proposal rated slightly stronger in "specific capabilities." Relative to number (5), the contracting officer expressly stated that the use of the R/V Hero's relief skipper as a manager at Palmer Station seemed especially appropriate.

Thus, from our review of the evaluators' comments and the contracting officer's analysis of the areas involved, we must conclude that these matters were fairly considered and not overlooked by NSF. Further, we note that number (7) is essentially H&N's unsupported opinion that the agency's estimated labor cost savings of the ITT proposal is unrealistic. Against H&N's unsupported opinion, the record contains the detailed and complete cost analysis of both proposals. Based on the record, H&N has provided no basis for us to disagree with the agency's cost analysis.

Regarding number (2), we note that the contracting officer felt that one evaluator's score was out of line with the others because he had worked closely with H&N for some time. We also note that he similarly discounted another evaluator's comments which he believed were biased toward ITT. We recognize the reasonableness of H&N's argument--that the close association could have provided that evaluator with a clearer perspective than the other evaluators; however, when presented with two reasonable approaches, as here, we have no basis to disagree with the contracting officer's view. Finally, regarding number (1), the record provides no basis for us to decide whether H&N's representative went to Palmer Station, but, in view of our other conclusions, whether he went clearly would not have been outcome determinative here.

Thus, after carefully examining each of the eight objections that H&N has with the contracting officer's determination, we note that essentially H&N disagrees with that determination. A protester's disagreement with an agency's award determination does not make it erroneous or illegal. CompuScan, Inc., supra. H&N has the burden of showing that errors were made and that absent such errors the outcome would have been different but, from our review of the record, we cannot conclude that the evaluation was erroneous or prejudical to H&N. Accordingly, these aspects of H&N's protest are also denied.

R. F. Keller

Deputy Comptroller General
of the United States